Supreme Court, U. S.
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79-2068

IN THE

Supreme Court of the United States

October Term, 1979

No. ———

W. TURTON THOMPSON,

Petitioner,

v.

MEDICAL LICENSING BOARD OF INDIANA and ERNEST R. BEAVER, JAMES N. HAMPTON, ROBERT R. KOPECKY, JOHN H. MADER, WALTER J. BENEVILLE, BRUCE C. BRINK, and EDWARD L. HOLLENBERG, Individually and as Members of the Medical Licensing Board of Indiana,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, SECOND DISTRICT

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM E. DAILY
Chief Counsel/Staff

JEFFREY G. FIHN
Deputy Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6248

C. E. Pauley & Co., Inc., Indianapolis

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STATUTES INVOLVED

The statutes involved in this case are 42 U.S.C. §§ 1983 and 1988 which are set out in the Appendix at A43 of Petitioner's Brief and Indiana Code §§ 4-22-1-1, 4-22-1-3, 4-22-1-14 and 25-22.5-6-2(5)(6) as more fully set forth in Appendix A1, and A3.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Indiana Court of Appeals properly applied Indiana law in comport with Federal law to a cause

of action pursuant to 42 U.S.C. § 1983 requiring that Plaintiff exhaust his administrative remedies before being entitled to seek judicial review?

2. Whether the Plaintiff is required to exhaust his state administrative remedies where he challenges the alleged non-impartiality of the Medical Board's *in futuro* hearing before seeking judicial review under 42 U.S.C. § 1983?

STATEMENT OF THE CASE

This case started in October 23, 1975, when the Indiana Medical Licensing Board (the "Board") instituted disciplinary proceedings against Dr. Turton W. Thompson ("Thompson"), charging him with violations of I.C. 25-22.5-6-2(5) and (6), which provide:

> To promote uniformity among the several states and territories and to provide guidelines for physicians and the board, the following charges will be grounds for probation of a licensee or suspension or revocation of a license:
>
> • • •
>
> (5) Except as otherwise permitted by law, to knowingly prescribe, sell or administer any drug classified as a narcotic, addicting or dangerous drug to a habitue or addict;
>
> (6) Willful or wanton misconduct or manifest incapacity in the practice of medicine or osteopathic medicine.

Thompson is alleged to have violated this statute by providing prescription drugs to female patients in return for sexual favors. The Board's charge against Thompson alleged he had violated I.C. 25-22.5-6-2(5) and (6) by:

> 1. Illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and

quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2(5), Chapter 6 of Acts 1975, Public Law 271. [IC 25-22.5-6-2(5).]

2. Committing willful and wanton misconduct in the practice of medicine by illegally and knowingly issuing prescriptions for Schedule II Controlled Substances, desoxyn and quaalude, and Schedule IV Controlled Substance, dalmane, to female patients for non-therapeutic purposes in exchange for sexual acts with these patients performed at his office, pursuant to Section 2(6), Chapter 6 of Acts 1975, Public Law 271. [I.C. 25-22.5-6-2(6)]

The Board chose to proceed against Thompson by scheduling an administrative disciplinary hearing for Thursday, February 12, 1976, commencing at 9:00 a.m. This hearing would be before the Board which includes as its members five (5) physicians, one (1) osteopathic physician, and one (1) chiropractor.

One day prior to the Board hearing Thompson brought suit to restrain the Board. The case was commenced in the Marion Superior Court, Room Seven, on February 11, 1976 seeking injunctive and declaratory relief against the Board pursuant to 42 U.S.C. § 1983 and certain Indiana statutes. Thompson sought to restrain the Board from initiating the administrative proceedings against him.

On June 14, 1976, Judge Zore of Marion Superior Court, Room Seven, granted the Board's motion to dismiss the complaint on the grounds that Thompson, by failing to proceed with the Board disciplinary hearing, had failed to exhaust state administrative remedies. The relevant portion of Judge Zore's order provided:

> ORDERED that defendants' motion to dismiss be, and is hereby, GRANTED upon the ground that the plaintiff has failed to exhaust his administrative remedies before the Medical Licensing Board of Indiana. Accordingly, it is the judgment of this Court that plaintiff's verified complaint be, and is hereby, DISMISSED, each party to bear its own costs in the action.

Thompson perfected an appeal from this decision and the trial court, pursuant to Thompson's motion, granted an injunction and stay of any Board action pending appeal.

On April 25, 1979, the Indiana Court of Appeals, Second District, affirmed the dismissal of the complaint in an opinion reported at 389 N.E.2d 43. This opinion held that judicial review of administrative decisions under the Indiana Administrative Adjudication Act, I.C. 4-22-1, provided the exclusive means to obtain judicial relief from the Indiana administrative process and that exhaustion of any administrative proceedings was required prior to seeking judicial relief.

On May 11, 1979, Thompson petitioned the Court of Appeals for rehearing, raising as the basis for this petition the failure of the Court of Appeals to address the issue of exhaustion under 42 U.S.C. § 1983. The Court of Appeals denied this petition, in an opinion dated December 26, 1979, and reported at 398 N.E.2d 679, holding, in relevant part, as follows:

> "No case cited by Thompson, nor any which we have been able to locate, demands that a state court abandon its own requirements of exhaustion merely because the claim before it is based upon § 1983.
>
> Language in the federal decisions so indicates. In *Snyder v. Altman, supra,* the court stated:

> The general rule is that there is no need to exhaust possible state remedies before pursuing a civil rights action *in federal court.* (emphasis supplied)

444 F.Supp. at 1270.

Likewise, the court in *Kahn v. Shainswit, supra,* remarked:

> [Our decision] does not violate the general rule that *a federal litigant* need not exhaust state remedies in a § 1983 action. (emphasis supplied).

414 F.Supp. at 1068.

Thus we repeat, a state court does not undergo a metamorphosis into a federal court merely because it must decide a § 1983 suit.

Thompson sought transfer of his case to the Indiana Supreme Court by petition dated January 4, 1980. This petition was denied on April 3, 1980, terminating the litigation between the parties in the Indiana courts.

REASONS FOR DISALLOWANCE OF THE WRIT

1. The Decision Below Merely Determined Jurisdiction of The State Court, Thus No Substantial Federal Question Was Presented.

42 U.S.C. § 1983 unto itself is not a jurisdictional statute and does not confer or expand upon the jurisdiction of either federal or state trial courts. This is clearly enunciated in *Gonzales v. Young,* 560 F.2d 160 (1977) at p. 164.

> "Section 1983 provides for a federal cause of action to redress the deprivation, under color of state law, of any rights, privileges, or immunities secured by the Constitution and laws.
>
> . . . . "We hold that it is not a jurisdictional

> statute; it only fashions a remedy. Thus, although Gonzales may have asserted a claim under Section 1983, she had to look to other authority to obtain jurisdiction."

Affirmed — U.S. —, 99 S.Ct. 1905 (1979). In the instant case petitioner chose the Indiana State Courts as his forum and thus was mandated to comply with Indiana state jurisdictional requirements. The Indiana Court of Appeals in its published opinion reported at 398 N.E.2d 679, stated that if the administrative remedy had not been exhausted then a state court did not have jurisdiction to take action.[1]

Under Indiana law exhaustion of administrative remedies is a jurisdictional requirement whose judicial boundaries are not expanded by 42 U.S.C. § 1983. Thus the Indiana Court of Appeals was correct in holding that the Indiana state trial court was without jurisdiction to hear petitioner's case due to petitioner's failure to exhaust administrative remedies as required under state law.

Each state retains the right to determine its own court's jurisdictional requirements through application of state law. The jurisdictional procedures provided under state administrative law are not patently offensive to federal due process rights therefore no right to judicial review existed in state courts until the administrative procedures utilized to find the facts are exhausted. Determination by judicial review of any alleged bias in the administrative process is a factual issue whose review as to any alleged

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[1] *State ex rel. Indianapolis Water Co. v. Boone Circuit Court* (1974) 261 Ind. 583, 307 N.E.2d 870; *Indianapolis Power & Light Co. v. Highland Realty Co.* (1970) 253 Ind. 637, 256 N.E.2d 94; *State ex rel. Public Service Commission v. Marion Circuit Court* (1961) 242 Ind. 145, 177 N.E.2d 397; *Amburgey v. Miller* (1977) — Ind. App. —, 362 N.E.2d 869; *Indianapolis Bell Telephone Co. v. Friedland* (1978) — Ind. App. —, 373 N.E.2d 344.

constitutional violations arising therefrom is provided for under I.C. 4-22-1-14.

Gibson v. Berryhill, 411 U.S. 564 (1973), relied upon by the petitioner, involved an action filed by the aggreived parties in federal district court where federal jurisdictional requirements are applicable. However, federal jurisdictional requirements are not applicable to a cause of action filed in state court where state jurisdictional requirements are not patently offensive to the constitutional rights of this petitioner.

Rule 17 of the Rules of this Court provides for a writ of certiorari to a state court where that court has rendered an opinion which is in conflict with applicable decisions of this Court or other federal courts of appeal. The Indiana Court of Appeals, with due regard for both the preservation of unfettered action by administrative agencies operating within the sphere of their authority and protection of Petitioner's constitutional rights under 42 U.S.C. § 1983, properly held that Petitioner was required to exhaust his administrative remedies under I.C. 4-22-1-1, I.C. 4-22-1-3 and I.C. 4-22-1-14. The Indiana Court of Appeals found that judicial review of orders, decisions or determinations rendered by an administrative agency, alleged to be contrary to constitutional rights, duties or privileges, was specifically incorporated into Indiana statutory law and judicial adjudications thereof.[2]

As the Indiana Court of Appeals demonstrated in citing the *Paynter* case, *id,* not only may final determinations of

[2] The exclusivity of judicial review subsequent to exhaustion of administrative remedies was clearly enunciated in *State ex rel. Paynter v. Marion County Superior Court, Room No. 5* (1976), — Ind. —, 344 N.E.2d 846, 851; *Public Service Commission of Indiana et al. v. City of Indianapolis* (1956), 235 Ind. 70, 83, 131 N.E.2d 308, 313; *Indiana Alcoholic Beverage Commission v. McShane* (1976), — Ind. App. —, 354 N.E.2d 259.

an administrative agency be subjected to judicial review but also so may findings of fact be so subjected. Generally, however, judicial review is denied for lack of finality if an action by an administrative agency is only anticipated. *Downing v. Bd. of Zoning Appeals* (1971), 149 Ind. App. 687, 274 N.E.2d 542; *State of New York v. United States,* 568 F.2d 887 (2d Cir., 1977). In the administrative law context, a claim is ripe for pre-enforcement judicial consideration only if (1) the issues presented are purely legal, (2) the issues arise out of a final agency action . . . (4) the litigation will expedite final resolution rather than delay or impede effective agency enforcement. *Pennzoil v. Department of Energy,* 466 F.Supp. 238, 241 (D.C. Del., 1979). *Rochester Telephone Corp. v. United States,* 307 U.S. 115 (1939).

The policies underlying the doctrine of exhaustion of administrative remedies are similar to those underlying the ripeness doctrine, to-wit: ensuring development of a full factual record before decision, allowing for the application of administrative expertise to the factual record as developed and promoting judicial efficiency in the resolution of controversies. *Pennzoil, Id.*

In *Plano v. Baker,* 504 F.2d 595 (2d Cir., 1974) and *Metcalf v. Swank,* 444 F.2d 1353 (7th Cir., 1971), the United States Court of Appeals held that an administrative procedure adequate to require exhaustion prior to commencing suit under 42 U.S.C. § 1983 to vindicate the interference with a constitutional right would include: the right to hear and refute evidence presented against one's self, the right to present evidence on one's behalf, the right to call witnesses on one's behalf and the right to an impartial tribunal. Clearly, application of the Indiana Administrative procedure through its statutorily provided adjudicatory

levels would give Petitioner the constitutional safeguards which he now seeks.

All of Petitioner's cases cited in support of the proposition that administrative remedies need not be exhausted where a 42 U.S.C. § 1983 violation is alleged originate from a lower federal court adjudication not a state court. Petitioner chose the state court as his forum and further chose to challenge the constitutionality of I.C. 25-22.5-6-2(5) and (6). The right to practice medicine is a conditional right which is subordinate to the state's power and duty to safeguard the public health, and it is the universal rule that in the performance of such duty and in the exercise of such power, the State may regulate and control the practice of medicine and those who engage therein, subject only to the limitation that the measures adopted must be reasonable, necessary and appropriate to accomplish the legislature's valid objective of protecting the health and welfare of its inhabitants. It is beyond dispute that the power of the State to regulate the practice of medicine includes the power to create an administrative board and vest in it the supervision of such regulation. *Geiger v. Jenkins,* 316 F.Supp. 370, 373 (1970), *cert. denied* 91 S.Ct. 1236. The doctrine of exhaustion of administrative remedies provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed civil administrative remedy has been exhausted. Perhaps the most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. *McKart v. United States,* 395 U.S. 185 (1969); *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938).

Respondent would strongly urge that the Indiana Court of Appeals proprietously applied Indiana law to a matter of

public health and welfare within its borders; to-wit: the licensing and regulation of medical doctors within its borders. The Indiana Administrative Adjudication Act provides for judicial review of alleged violations of constitutional rights and immunities as well as for arbitrary or capricious acts which might occur throughout the administrative review process.

Unequivocally, Petitioner's claim for relief under 42 U.S.C. § 1983, in the case at bar, is unripe for adjudication by this Court and is a subterfuge to avoid the prescribed state jurisdictional requirements and state administrative remedies. *Lake Carriers Association v. MacMullan,* 406 U.S. 498 (1972). Thus, no writ should issue unless and until the administrative process, including judicial review, is final; particularly since there has not even been an initial determination by the Medical Review Board in the case at bar.

2. Plaintiff Is Required to Exhaust His Administrative Remedies Where Bias Is Alleged Before Bringing Suit Under 42 U.S.C. § 1983.

This Court has consistently held that the mere allegation of non-impartiality in an adjudicatory proceeding so as to promulgate a claim under 42 U.S.C. § 1983 does not automatically relieve a plaintiff from the burden of exhausting his administrative remedies prior to instituting suit. Plaintiff's reliance upon *Gibson v. Berryhill,* 411 U.S. 564, 581 (1973), is misplaced in that the facts therein are clearly distinguishable from the ones in the case at bar. In *Gibson,* the Alabama Board of Optometry instituted suit in federal court on the same charges which comprised the subject matter of the state administrative proceeding; to-wit: whether the Lee Optical Company's employment of

licensed optometrists constituted a corporation practicing optometry. The bias alleged to be present in *Gibson* was of a type deemed particularly suspect in light of § 1983; board members stood to become financial heirs to customers who would no longer be able to utilize the services of the suspended practitioners. In the case at bar, there has been no showing that Robert Kopecky, the complainant and Board member had any personal financial stake in the outcome of the administrative hearings. In *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), this Court in a factual setting, almost indistinguishable from the one at bar, held that the type of bias justifying federal intervention under § 1983 arose where the adjudicator had a pecuniary interest in the outcome and the adjudicator had been the target of personal abuse or criticism from the party before him. This Court held that there is a presumption of honesty and integrity in an adjudicator and any party challenging same under the contention of non-impartiality due to performance of investigative and adjudicatory functions had a difficult burden of persuasion to carry.[3] I.C. 25-22.5-6-3.

As more fully set forth *supra*, the Indiana Administrative Adjudication Act provides adequate constitutional safeguards against alleged bias so as to require exhaustion of state remedies prior to bringing a suit under § 1983. To permit adjudication of the constitutional claim would leave unresolved the misconduct charges against the petitioner resulting in piecemeal review and the potential for indeterminate delay. Thus, a writ should be denied.

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[3] . . . It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

CONCLUSION

The decision below proprietously applied Indiana law as a jurisdictional bar to a cause of action arising under 42 U.S.C. § 1983. With sufficient constitutional safeguards set forth in the Indiana statutes governing Administrative adjudication and judicial review thereof, a writ should not issue in this cause.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

WILLIAM E. DAILY
Chief Counsel/Staff

JEFFREY G. FIHN
Deputy Attorney General

Attorneys for Respondents.

APPENDIX

4-22-1-1 [63-3001]. Intent of act.—It is the intent to establish a uniform method of administrative adjudication by all agencies of the state of Indiana, to provide for due notice and an opportunity to be heard and present evidence before such agency and to establish a uniform method of court review of all such administrative adjudication. [Acts 1947, ch. 365, § 1, p. 1451.]

4-22-1-3 [63-3003]. Determination of rights, duties, obligations, privileges or other legal relations by agencies.— In every administrative adjudication in which the rights, duties, obligations, privileges or other legal relations of any person are required or authorized by statute to be determined by any agency the same shall be made in accordance with this act [4-22-1-1—4-22-1-30] and not otherwise. [Acts 1947, ch. 365, § 3, p. 1451.]

4-22-1-14 [63-3014]. Judicial review — Courts — Procedure. — Any party or person aggrieved by any order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act [4-22-1-1—4-22-1-30]. Such review may be had by filing with the circuit or superior court of the county in which such person resides, or in any county in which such order or determination is to be carried out or enforced, a verified petition setting out such order, decision or determination so made by said agency, and alleging specifically wherein said order, decision or determination is:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or

(2) Contrary to constitutional right, power, privilege or immunity; or

(4) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or

(4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence.

Said petition for review shall be filed within fifteen [15] days after receipt of notice that such order, decision or determination is made by any such agency. Notice shall be given in the manner prescribed by section 6 [4-22-1-6] of this act. Unless a proceeding for review is commenced by so filing such petition within fifteen [15] days any and all rights of judicial review and all rights of recourse to the courts shall terminate.

Written notice of the filing of such verified petition for review and a copy of said petition shall be personally served upon the agency and the attorney-general. Where the agency consists of more than one member it shall be personally served upon the secretary or chairman of such agency.

Any party or person so filing such verified petition for review with such court shall within fifteen [15] days thereafter secure from such agency a certified copy of the transcript of said proceedings before the agency including the order or administrative adjudication sought to be review and file the same with the clerk of such court in which such action for review is pending. An extension of time in which to file such transcript shall be granted by said court in which such action for review is pending for good cause shown. Inability to obtain such transcript within time shall be good cause. Failure to file such transcript within said period of fifteen [15] days, or to secure an extension of time therefor, shall be cause for the dismissal of such petition for review by the court or on petition of any party of record to the original proceeding. Where more than one person may be aggrieved by the administrative adjudication only one [1] proceeding for review may be had and the court in which a petition for review is first property filed shall have jurisdiction. All persons who were parties to the hearing before the agency shall be made parties to the petition for view and shall be notified thereof by the person filing such petition. [Acts 1947, ch. 365, § 14, p. 1451; 1957, ch. 355, § 4, p. 1033.]

25-22.5-6-2. Probation — Suspension — Revocation. — To promote uniformity among the several states and territories and to provide guidelines for physicians and the board, the following charges will be grounds for probation of a licensee or suspension or revocation of a license:

(1) The use of any false, fraudulent or forged statement or document, or the use of any fraudulent, deceitful, dishonest or immoral practice in connection with any of the licensing or permit requirements;

(2) The acts from which a felony conviction resulted, if the acts have a direct bearing on whether or not the person should be entrusted to serve the public as a licensed physician;

(3) Currently using or consuming a drug or intoxicant so as to render the licensee unsafe or unfit to practice medicine or osteopathic medicine;

(4) Suffering from a mental or physical disability so as to render the licensee unsafe or unfit to practice medicine or osteopathic medicine;

(5) Except as otherwise permitted by law, to knowingly prescribe, sell or administer any drug classified as a narcotic, addicting or dangerous drug to a habitué or addict;

(6) Wilful or wanton misconduct or manifest incapacity in the practice of medicine or osteopathic medicine;

(7) The practice of medicine or osteopathic medicine under a false or assumed name;

(8) The willful performance of an act likely to deceive or harm the public; or

(9) The suspension or revocation by another state of a license to practice medicine based upon acts by the licensee similar to acts described in this section. A certified copy of the record of suspension or revocation is conclusive evidence of the other state's suspension or revocation. [I.C. 25-22.5-6-2, as added by Acts 1975, P.L. 271, § 1; 1979, P.L. 246, § 2.]

25-22.5-6-3. Disciplinary proceedings. — (a) Proceedings for the probation of a licensee or a permit holder or

the revocation or suspension of any license or permit to practice medicine or osteopathic medicine in Indiana must be commenced by the filing of written verified charges with the secretary of the board. These charges may be filed by any resident of Indiana, or by the secretary or any member of the board upon information from whatever source in his possession, which causes the member to have reasonable cause to believe that the matter should be filed and placed before the board for its determination. Proceedings for probation of a licensee or permit holder or revocation or suspension of any license or permit to practice medicine or osteopathic medicine in Indiana must be conducted according to the administrative adjudication act of Indiana, I.C. 4-22-1 [4-22-1-1—4-22-1-30]. Approval by a majority of all members of the board shall be required for any action to be taken.

(b) Any person who files charges or testifies before the board in any disciplinary proceeding is immune from civil liability for damages for any sworn or written testimony made with probable cause and without malice.

(c) The administrator, his staff, counsel, investigators, hearing officers, and the board members are immune from civil liability for damages for conduct within the scope and arising out of the performance of their duties. [I.C. 25-22.5-6-3, as added by Acts 1975, P.L. 271, § 1, p. 1501; 1977, P.L. 172, § 28, p. 749.]